Petition

Office - Supreme Court, U.S.
FILED
DEC 16 1981
ALEXANDER L. STEVAS,
CLERK

81-1131

NO. 81-_____

IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1981

W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

WESLEY SELLERS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARK WHITE
Attorney General of Texas

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

JOHN W. FAINTER, JR.
First Assistant Attorney General

CHARLES A. SHARMAN
Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Petitioner

QUESTION PRESENTED

Whether a general request for all "offense reports and witness statements whatsoever" can be treated as a specific request under *United States v. Agurs*, on the basis of defense counsel's lack of express knowledge?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

ARGUMENT 6

I. The Decision Below Conflicts With Controlling Supreme Court Precedent 6

A. The Specificity Of A Request Cannot Turn On What The Defense Counsel Knew Or Should Have Known 7

B. The Omitted Information Does Not Create A Reasonable Doubt That Sellers Shot Officer Moody 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases **Page**

Brady v. Maryland, 373 U.S. 83 (1963) 6,7,8

Moore v. Illinois, 408 U.S. 786 (1972) 9

Sellers v. Estelle, 651 F.2d 1074 (5th Cir. 1981) 1,2,3,6

Sellers v. State, 492 S.W.2d 265 (Tex.Crim.App. 1973) 3

United States v. Agurs, 426 U.S. 97 1976) 7,8,9,10,11

Statutes

U.S. CONST., Amend. XIV, Section 1 2

28 U.S.C. §1254(1) 2

28 U.S.C. §2254 2

NO. 81-_____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1981

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

WESLEY SELLERS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, W. J. Estelle, Jr., Director, Texas Department of Corrections respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 27, 1981.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Sellers v. Estelle*, 651 F.2d 1074 (5th Cir. 1981), and reproduced in the Appendix together with the Order denying the Petition for Rehearing and the United States District Court Judgment and Order, and the United States Magistrate's Report and Recommendation.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit in *Sellers v. Estelle*, 651 F.2d 1074 (5th Cir.) was entered on July 27, 1981. Respondent timely filed a petition for rehearing which was denied on September 17, 1981.

This petition for writ of certiorari was filed within ninety days after final judgment in this case. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., Amend XIV, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In June 1973, Sellers filed an application for writ of habeas corpus in the United States District Court for the Southern District of Texas, Houston Division, pursuant to 28 U.S.C. §2254, challenging a state conviction. Texas has custody of Sellers pursuant to a judgment and sentence of the 182nd Judicial District Court, Harris County, Texas, in Cause No. 144485, styled *The State of Texas v. Wesley Sellers.* Sellers pled not guilty to a charge of murder with malice, was convicted by a

jury, and was sentenced to life imprisonment in the Texas Department of Corrections on April 14, 1970.

Sellers's conviction was affirmed on direct appeal, *Sellers v. State*, 492 S.W.2d 265 (Tex.Crim.App. 1973). Sellers's Motion for Rehearing was denied on April 11, 1973. On February 9, 1977, Sellers's state writ application was denied by the Texas Court of Criminal Appeals without written order.

A hearing was held in September 1978 before United States Magistrate Norman W. Black at which Petitioner was represented by counsel. In February 1979, the Magistrate entered his Findings and Conclusions, recommending that all relief be denied. In July and August 1979, the district court entered its Order and Final Judgment, adopting the Magistrate's Findings and Conclusions and denying all relief.

Sellers appealed to the Fifth Circuit. The Fifth Circuit reversed and remanded for an evidentiary hearing on the suppression issue only. *Sellers v. Estelle*, 651 F.2d 1074 (5th Cir. 1981). Petition for Rehearing was denied September 17, 1981.

On remand, the district court held an evidentiary hearing in November and December 1981. The United States Magistrate has not yet issued his Findings and Recommendation.

Shortly after midnight, November 26, 1969, a silent burglar alarm went off in Hamilton Junior High School in Houston, Texas. The first police unit to arrive on the scene at 1:05 a.m. was manned by Houston police officers Kenneth Wayne Moody and R. R. Dietrich (PX 17a, 194.)[1] Upon checking first floor windows and

1. Petitioner's Exhibits 17a and 17b (PX 17a, PX 17b) are the Transcript and Statement of Facts from Sellers' murder trial, introduced into evidence at the 1978 federal hearing.

entrances, the officers discovered an unlocked window with a broken pane of glass. (PX 17a, 201). The officers opened the window and were proceeding across the classroom when they heard "a noise, a rustling of feet down in the hallway." (PX 17a, 202). Going down the main hallway of the school, the officers came abreast of a small hall leading to a stairwell and an exit door that was locked and chained; suddenly, a shot rang out. (PX 17a, 203, 206). Both officers advanced on their assailant; there was a rapid exchange of gunfire and Officer Moody was fatally wounded. (PX 17a, 208-10). Officer Dietrich removed his partner to a position out of the line of fire. As he did so he heard footsteps running up the stairs. (PX 17a, 211). Dietrich testified he could not see the individual firing at them because of the darkness, but that, in the flash of the gunfire, he could see their assailant's forearm and a hand which was covered with "yellowish looking apparel." (PX 17a, 212-13).

Officer Dietrich left the building for a few minutes to summon assistance; when other officers arrived, some of them, including J. E. Ruchti, went up the stairs to search the second floor. (PX 17a, 226, 263). Detectives going over the scene later that morning discovered spots of blood on the stairs leading up, and along the second floor hallway where Sellers was apprehended. (PX 17a, 320-22). Officer Ruchti was moving down the second floor hallway when he heard a noise, a "tinkle," like a piece of glass hitting metal. (PX 17a, 265, 281). He went toward the noise and saw a blue flashlight lying on the floor before a small room at the end of the hall that gave onto the fire escape landing. (PX 17a, 267). Ruchti approached the door into the small room, and as he neared it, Sellers scooted across the floor to the fire escape. Ruchti ordered him to stop and when he continued, Ruchti fired one shot that struck the sill of the fire escape door, missing Sellers. (PX 17a, 269-70). About fifteen seconds before Ruchti's shot, Officer

Walker, arriving outside, heard a .25 caliber automatic strike a covered walkway behind the school and fall to the ground about fifty feet from the fire escape landing. (PX 17a, 293, 304, 308). This pistol was later identified as the murder weapon. (PX 17a. 464).

At the time of his apprehension Sellers was wounded and wearing one yellow glove and another was lying nearby. He was dressed in dark clothes, burglar tools were on the fire escape landing, and five live .25 caliber rounds were found in his pocket of the same make as those found in the murder weapon. (PX 17a, 272; PX 17b, 454-464).

In April 1970 Sellers was tried for the murder of Officer Moody, represented by retained counsel Leon Phillips. Phillips filed a "Pretrial Motion for Discovery" (PX 17a, 11-15); that motion requested tape recorded, written or oral statements *of the defendant* and all *physical evidence* exonerative or favorable to Sellers. At the oral pretrial hearing on discovery, Phillips expanded this request and asked for all police offense reports and witness statements whatsoever, which were not properly discoverable at that stage of the proceedings and were not turned over to the defense. (PX 17a, 73-74).

At trial Sellers testified in his own behalf. His defense was that an enemy of his, Leonard Minor, had kidnapped him, taken him to the school blindfolded and with his hands tied behind his back. He claimed to have been knocked unconscious twice, coming to the second time he was confronted by police who shot him and then shot at him a second time. (PX 17b, 523-38, 545-46).

During the cross-examination of Detectives C. E. Smith and M. W. Langford, the two chief investigating officers in the case, defense counsel requested and was

provided with some but not all of the reports. (PX 17a, 356-59, PX 17b, 380-2). Defense counsel did not request the court to examine the entire report for exculpatory or *Brady* material. Counsel did not ask any of the other testifying officers for their offense reports.

The material allegedly suppressed in violation of due process consists of a series of offense reports and one witness statement. (PX 1, 1-14). The reports state that a Santos Cantera allegedly told three juveniles, Alfredo Valenzuela (age 14), Albert Santos (age 11) and Amos Santos (age 10), that he had broken into Hamilton Junior High School and shot Officer Moody, and displayed to them a pistol he claimed was the murder weapon. Cantera himself orally admitted to police that he knew Sellers and had committed the burglary with him and another individual, but that he did not shoot Moody. Investigating homicide officers found no corroborating evidence and based on inconsistencies and gaps in Cantera's story concluded that he was not involved and released him in connection with the murder.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Controlling Supreme Court Precedent.

ARGUMENT

I. The Decision Below Conflicts With Controlling Supreme Court Precedent.

The court below treated a request for "the offense reports and any other written statements . . . any written statements whatsoever concerning this case" (PX 17a, 73-74), as a specific request under *Brady v. Maryland*, 373 U.S. 83 (1963), on the basis that defense counsel "could not have been more specific absent express knowledge of Cantera's Valenzuela's and the Santos Brothers' reports." 641 F.2d 1074, 1077. (A. 9).

The court below then judged the materiality of the reports on whether their disclosure "might have affected the outcome of the trial." (A. 9). This holding is totally inconsistent with this Court's decision in *United States v. Agurs*, 426 U.S. 97 (1976).

A. The Specificity Of A Request Cannot Turn On What The Defense Knew Or Should Have Known.

The lower court's approach, taking into account the extent of defense counsel's knowledge in determining the specificity of the request (or, as the Fifth Circuit expressed it at oral argument; "How could he specifically ask for that which he did not know existed?"), alchemically converted the dross of a general request for the prosecutor's entire file into the gold of a specific *Brady* request and its corresponding low standard of materiality.

In *Agurs, supra*, this Court wrote:

> In many cases, however, exculpatory information in the possession of the prosecutor may be unknown to defense counsel. In such a situation he may make no request at all, or possibly ask for "all *Brady* material" or for "anything exculpatory." Such a request really gives the prosecutor no better notice than if no request is made. If there is a duty to respond to a general request of any kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor.

427 U.S. at 106-7. The *Agurs* decision cannot be clearer that the focus is on the quality of the notice given to the prosecutor or the nature of the evidence itself, *not* whether defense counsel knew enough to make a better request.

It cannot be seriously contended that this request for "offense reports and written statements," (which by its own terms is not even limited to favorable evidence) gave the prosecutor notice "of exactly what the defense desired," *Agurs*, 427 U.S. at 106, i.e., reports indicating Cantera was involved. This request gave the prosecutors no inkling that any such reports existed. On remand, both prosecutors testified at the 1981 federal hearing that the offense reports were not in their file and they had no knowledge of their existence at the time of trial. Had they had any notice, they could have obtained these reports from the police and made them available to the defense. In these circumstances, under *Agurs*, reversal is allowed only "if the omitted evidence creates a reasonable doubt that did not otherwise exist." *Agurs*, 427 U.S. at 112-13.

The lower court's sleight of hand unwisely opens a Pandora's Box of questions concerning what the defense actually did know. These questions are irrelevant to the central due process concern of *Brady v. Maryland:* "avoidance of an unfair trial to the accused," 373 U.S. 83, (1963).

Nonetheless, the Fifth Circuit's excuse that the request could not have been more specific absent express knowledge raises the question whether Wesley Sellers had such knowledge since Cantera's oral statement to the police indicates Sellers and he went to the school together. If Cantera's statement is true, Sellers could not ask the police if they had any evidence or knew of the involvement of Cantera, his accomplice, without revealing to the police the witness who could destroy his kidnap defense, a witness the police might not otherwise find.

If allowed to stand, the ruling below also encourages defense counsel to present a discovery laundry list of

every conceivable category of evidence. Then, if any information is later found not to have been disclosed, defendants can avail themselves of the lower standard of materiality by simply pleading or feigning ignorance of sufficient facts to make a more specific request. Prosecutors will be forced, despite the absence of any constitutional requirement, "to make a complete and detailed accounting to the defense of all police investigatory work on a case." *Agurs*, 427 U.S. at 109, *quoting Moore v. Illinois*, 408 U.S. 786, 795 (1972). This Court's directions to the contrary will be turned on their head as a result.

The lower court's approach is thus not only misplaced, but exposes treacherous, murky and difficult quagmires lower courts will inevitably have to negotiate if the precedent is allowed to stand.

The record also reflects that defense couunsel could have *easily* made a far more specific request. It was the defense theory all along that third parties murdered the police officer, yet never once was the prosecutor asked to produce all evidence of *third party involvement.* Again, defense counsel made a motion for continuance to locate a newspaper reporter who "would testify the other officers told him two persons ran from the building . . ." (PX 17a, 87). No request was made to the prosecutor to acquire those officers' identities or offense reports, or if there were any indications others were involved. In questioning the homicide investigating officers Smith and Langford, despite the questioning concerning Danny Paul Gearing's alleged admission to the offense, no request was made to see any other offense reports dealing with Gearing or other evidence indicating someone else was involved. (PX 17a, pp. 357, 360, 382). Clearly, a more specific request than "all offense reports and written statements dealing with the case" could have been made that would have given the prosecution better notice.

Since no specific request was ever made, *Agurs, supra,* requires a finding that the Cantera offense reports and the Valenzuela statement create a reasonable doubt as to guilt or punishment before the conviction can be overturned. The lower court's decision directly conflicts with *Agurs.*

B. The Omitted Information Does Not Create A Reasonable Doubt That Sellers Shot Officer Moody.

> The [omitted evidence] must be evaluated in the context of the entire record.

Agurs, supra, at 112. The jury had before it very strong evidence that Sellers was the actual killer of Officer Moody, the triggerman. The gun battle in which Moody received his mortal wound took place on the ground floor at the foot of the stairs. (PX 17a, 203, 208-10). A trail of spots of blood (visible in the photographs in the record) led up the stairs and down the hallways to where the wounded Sellers was apprehended. (PX 17a, 320-22). One yellow glove was on Sellers' hand; the other lay nearby (PX 17a, 272). It was a yellow gloved hand that pulled the trigger of the .25 caliber Browning automatic that ended Moody's life. (PX 17a, 212-13). The murder weapon was heard to strike a covered walkway and fall to the ground below the fire escape landing seconds before the single shot marked the discovery of Sellers in the doorway of the landing. (PX 17a, 293-304, 308). Sellers had live .25 caliber ammunition in his pocket. (PX 17b, 454-56, 464).

The kidnapping theory, if believed, might explain the yellow gloves, the burglary tools, the ammunition, and the proximity of the murder weapon. But in light of this evidence, if the kidnapping theory is exposed as a myth, then none of the rest — the gloves, the ammo, the gun — can be explained. Cantera's story to the police that Sellers went voluntarily to the school totally destroys the kidnap theory.

Only if one believes Valenzuela and the Santos Brothers were telling the truth and accurately reporting Cantera's confession to the murder,[2] and further believes that Cantera was telling the truth when he admitted guilt of the crime (despite the skepticism with which hearsay declarations are generally and justifiably regarded) and one also believes he was not telling the truth when he claimed to still have the murder weapon in his possession, and not telling the truth when he told police Sellers was there voluntarily; then and only then would there be any doubt as to the identity of the triggerman. Such a string of beliefs, each requiring a greater suspension of the ordinary powers of disbelief, is possible but is not reasonable. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not esablish 'materiality' in the constitutional sense." *Agurs,* 427 U.S. at 109-10. Sellers' conviction for the wanton murder of a policeman should not be set aside on the basis of mere possibilities, or the sporting chance that a jury might believe anything, however implausible or fantastic. The omitted evidence must be evaluated in the context of the entire record, not in the light most favorable to the accused.

---

2. In addition to their few and impressionable years, these children were being accused of participating in school burglaries with Cantera. Their excuse was that Cantera was forcing them to do so; claiming that he told them he was a cop-killer nicely bolsters their tale of terror and intimidation, a strong motivation for them to lie concerning any such statement.

CONCLUSION

For these reasons, Petitioner prays that the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

CHARLES A. SHARMAN
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Petitioner

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

NO. 80-1037

WESLEY SELLERS,
Petitioner-Appellant,

versus

W. J. ESTELLE, Etc.,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING
(September 17, 1981)

Before BROWN and TATE, Circuit Judges and SMITH*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

*District Judge of the Northern District of Mississippi, sitting by designation. Judge Orma R. Smith was a member of the panel that heard oral arguments but due to illness did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. 46(d).

Wesley SELLERS,
Petitioner-Appellant,

v.

W. J. ESTELLE, Etc.,
Respondent-Appellee.

No. 80–1037.

United States Court of Appeals,
Fifth Circuit.
Unit A

July 27, 1981.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN and TATE, Circuit Judges and SMITH*, District Judge.

TATE, Circuit Judge:

Petitioner Wesley Sellers, a Texas state prisoner, appeals from a district court judgment[1] in which his application for writ of habeas corpus was denied. Sellers alleges

---

*District Judge of the Northern District of Mississippi, sitting by designation. Judge Orma R. Smith was a member of the panel that heard oral arguments but due to illness did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. 46(d).

1. Sellers's petition was heard before a United States Magistrate, whose findings and conclusions of law were adopted by the United States District Court. (Rec. p. 210)

that certain evidence (police offense reports) favorable to him was withheld by the prosecution during his state court trial for murder which could have had an effect on his conviction and/or sentence. We agree with the petitioner Sellers that if he did not have the opportunity to review the allegedly withheld (but favorable) police offense reports, it constituted a violation of his due process rights. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963). However, because it is ambiguous from the state court records whether or not these reports were furnished to the petitioner for use at his murder trial, we must remand to the district court below for an evidentiary hearing on this issue. If the district court concludes at that hearing that the petitioner did not receive them, then Sellers's conviction is to be vacated and the writ of habeas corpus shall issue unless the petitioner is retried within a reasonable period of time.

Facts

The petitioner Sellers was arrested in the early morning hours on November 26, 1969, at the Hamilton Junior High School in Houston, Texas. Officers Kenneth Wayne Moody and R. R. Dietrich of the Houston Police Department had gone to the school in response to a silent burglar alarm which had been triggered. After arriving at the school, they started to conduct an investigation, shots were fired, and Officer Moody was fatally wounded.

Shortly thereafter, other officers arrived and, in their search of the premises, apprehended the petitioner Sellers, who himself had been shot and was apparently hiding in an upstairs classroom.

Sellers was subsequently indicted by a Texas Grand Jury (Petitioner's Ex. 17a, p. 2) for the killing of Officer Moody. This was a capital offense. After a jury trial, he was found guilty, and the jury fixed his sentence at life imprisonment (i.e., instead of sentencing him to death, or

to imprisonment for a lesser term of years, as was within the discretion of the jury). His conviction was upheld on direct appeal. *Sellers v. State,* 492 S.W.2d 265 (Tex.Cr. App.1973).

After unsuccessfully seeking state habeas corpus relief (Record p. 205), Sellers filed for habeas relief in federal district court. The basis of Sellers's application was that certain offense reports prepared by members of the Houston Police Department were withheld from him at the time of his trial for murder, in violation of his due process rights.[2] *Brady v. Maryland, supra.* Specifically, the offense reports allegedly suppressed revealed that: (1) Santos Cantera "orally admitted his part in this offense" (Petitioner's Ex. 1); (2) Santos Cantera made his admission of guilt to the police after he was implicated in the murder by three friends — Alfredo Valenzuela, Albert Santos and Amos Santos (Alfredo and Amos both told police that Cantera had admitted to each of them that he had killed the officer at Hamilton Jr. High School) (Petitioner's Ex. 1); (3) Santos Cantera had been charged with the burglary of another school on Sept. 9, 1969, less than 3 months before the offense in question (Petitioner's Ex. 1); and (4) Santos Cantera was charged with aggravated assault on a police officer on August 5, 1969, approximately 4 months before the murder at the junior high (Petitioner's Ex. 4).

After an "evidentiary hearing" on Sellers's petition (at which the state was required to produce its file), the matter was submitted on the basis of the police and state judicial records. In recommending denial of the petitioner's application, the Magistrate failed, however, to

---

2. At the evidentiary hearing held before the Magistrate, Sellers also asserted that the prosecution withheld other evidence (blood tests, photographs, etc.) in addition to the offense reports implicating another individual in Moody's murder. On appeal, however, Sellers only challenges the alleged impermissible suppression of offense reports favorable to him.

make a definitive ruling on whether or not the offense reports above cited were actually suppressed at trial. Nevertheless, the Magistrate concluded that, even if the reports were suppressed, Sellers "failed to carry his burden in this case, that is, to demonstrate facts that establish a constitutional violation." (Record p. 207).

In recommending denial of Sellers's petition for writ of habeas corpus, the Magistrate found that Cantera's oral statement was "*inculpatory* in that it place[d] Petitioner at the scene voluntarily,"[3] (Record p. 200); that the allegedly suppressed evidence was not material "in any constitutional sense" (Record p. 200), and that "Cantera's statements would have been inadmissible" under art. 38.22, Tex.Code Cr.P.,[4] and Valenzuela's written statement (implicating Cantera) inadmissible as hearsay. (Record p. 201).

---

3. As part of his defense presented at his trial for murder, Sellers contended that he was kidnapped by 3 masked men on the night the school was broken into and Officer Moody killed. He recognized the voice of one to be that of Leonard Minor, a personal enemy of his. Sellers contends that he was brought to the school by these individuals, knocked unconscious, and consequently framed by them (when he was discovered by the police on the second floor) for the burglary of the school and the murder of Officer Moody.

4. Article 38.22 of the Texas Code of Criminal Procedure reads in pertinent part:

> Sec. 3. (a) An oral statement of an accused made as a result of custodial interrogation is admissible against the accused in a criminal proceeding for the purpose of impeachment only and when:
>
> (1) an electronic recording, which may include motion picture, video tape, or other visual recording, is made of the statement;
>
> (2) prior to the statement but during the recording the accused is told that a recording is being made;

(footnote continued on following page)

After a thorough review of the record before us, we find that Sellers demonstrated sufficient facts to establish a constitutional violation.

I

[1] In *Brady v. Maryland, supra,* the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution, 373 U.S. at 87, 83 S.Ct. at 1196. In establishing a *Brady* violation, a defendant must prove: "(1) the prosecution's suppression of evidence, (2) the favorable

---

(footnote continued from previous page)

(3) prior to the statement but during the recording the accused is given a warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning;

(4) the recording device was capable of making an accurate recording, that the operator was competent, and that the recording is accurate and has not been altered;

(5) the statement is witnessed by at least two persons; and

(6) all voices on the recording are identified.

(b) Every electronic recording of any statement made by an accused during custodial interrogation must be preserved until its destruction is permitted by order of a district court of this state.

(c) Subsection (a) of this section shall not apply to any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as the finding of secreted or stolen property or the instrument with which he states the offense was committed.

character of the suppressed evidence for the defense; (3) the materiality of the suppressed evidence." *United States v. Sink*, 586 F.2d 1041, 1051 (5th Cir. 1978), cert. den., 443 U.S. 912, 99 S.Ct. 3102, 61 L.Ed.2d 876 (1979).

We pretermit for the moment discussion of the prosecution's alleged suppression of the police offense reports. See part II, infra.

Favorable Character of Evidence

The Magistrate concluded that the offense reports allegedly suppressed were not favorable to Sellers because they were inculpatory. As the Magistrate correctly noted, the offense reports were inculpatory to the extent that they placed the petitioner Sellers voluntarily at Hamilton Junior High School on the night that Officer Moody was killed. However, these reports were clearly *exculpatory* in that they indicated that another individual, Santos Cantera, not only was at the school that night, but that he admitted to others that he was the one who shot Officer Moody. (Petitioner's Ex. 1). Additionally, Seller's defense counsel was not afforded the opportunity to further develop the "kidnap theory" presented by the petitioner in light of this newly discovered, and partially exculpatory, evidence.

[2] We find, then, that the suppressed reports were favorable to the petitioner with respect to the determination of his guilt. A fortiori, this suppressed evidence was even more favorable to the petitioner with regard to his punishment. *Brady v. Maryland, supra.* The trial court instructed the jurors that "the punishment for murder with malice aforethought shall be by death or by confinement in the Texas Department of Corrections for life or *for a term of years not less than two.*" (Petitioner's Ex. 17a, p. 37) (Emphasis added). It is not inconceivable that, had the jury been made aware of this additional evidence (implicating Cantera with Officer Moody's murder), that

Sellers (even if found guilty of murder as a co-defendant, but not as the actual "triggerman") might have received a lesser sentence.

Materiality of Suppressed Evidence

The Supreme Court in *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), recognized three types of situations in which the *Brady* doctrine is applicable: (1) Those cases in which the prosecution has knowingly used false or perjured testimony — reversal required "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs,* 427 U.S. at 103, 96 S.Ct. at 2397; (2) Those cases in which the defense made a specific request for a particular item that was not disclosed — reversal is required if the suppressed evidence might have affected the outcome of the trial. *United States v. Agurs,* 427 U.S. at 104, 96 S.Ct. at 2398; and (3) Those cases in which the defense made only a general request or in which the state does not volunteer information in its possession that might be of an exculpatory nature — reversal is required only if the suppressed evidence "creates a reasonable doubt that did not otherwise exist. . . . If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." *United States v. Agurs,* 427 U.S. at 112-13, 96 S.Ct. at 2402.[5]

---

(5) A fourth situation was recognized by this court in *Garrison v. Maggio,* 540 F.2d 1271 (5th Cir. 1976), cert. den., 431 U.S. 940, 97 S.Ct. 2655, 53 L.Ed.2d 258 (1977). There, the court held that "an even stricter standard of materiality, one requiring petitioner to demonstrate that the new evidence probably would have resulted in an acquittal, is appropriate before a new trial must be granted for the nondisclosure of purely impeaching evidence." Id. at 1274.

[3] In the case before us, we find that the defense specifically requested the prosecution to produce "the offense reports and any other written statements" dealing with this case. (Petitioner's Ex. 17a, pp. 73-74). The petitioner could not have been more specific absent express knowledge of Cantera's, Valenzuela's and the Santos Brothers' reports. Accordingly, reversal is required if the suppressed evidence might have affected the outcome of the trial. Having already concluded that this evidence was favorable, we find that the suppressed evidence satisfies this threshold of materiality, both with respect to the petitioner's guilt and to his punishment.[6]

II

The final *Brady* requirement that we must address is the suppression issue — were the police offense reports relating to Cantera withheld (either intentionally or not) from the petitioner. The conflicting statements made by the Magistrate in his findings and conclusions of law leave us confused as to whether he made a specific finding of fact on this issue:

> The Petitioner was supplied at his State-Court trial only with that portion of the offense report which had been made by officers Smith and

6. In addressing the issue of materiality, the Magistrate found that Cantera's oral statements and Valenzuela's written statement would have been inadmissible, hence these reports were immaterial. (Record pp. 200-01). Such a conclusion is unwarranted. First, by enabling the defense to examine these reports, Sellers may have been able to produce witnesses whose testimony or written statements may have been admissible. *Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980). Second, the evidence here suppressed was material to the preparation of petitioner's defense, regardless of whether it was intended to be admitted into evidence or not.

> Langford. The "supplemental offense report" reflecting the "admissions" and proceedings involving Santos Cantera was apparently made by Officers Cashmere, McNutt, Brandan, Massey and Bland; *it was never produced.* (Record p. 198). [Italics supplied.]
>
> From the state appeal record and trial transcript before the Magistrate, it is impossible to determine whether this supplemental report was included in those reports given to defense counsel following testimony by Homicide Officers Smith and Langford. (Record p. 199).
>
> The Magistrate here will not speculate what statements or lab reports were contained in Officer Smith and Officer Langford's reports, even though they were the chief homicide investigating officers in that case. The Magistrate further notes that all *physical* evidence was available for inspection and expert witness testing by defense counsel. (Record p. 208). [Italics supplied.]

After reviewing the entire police records and the state court record, we ourselves are unable to determine positively whether the supplemental offense reports containing information on Cantera, Valenzuela, and the Santos brothers were furnished to the defense for trial preparation. The clear implication that we perceive from the record is that this material was indeed withheld, for there is a conspicuous absence in the state court trial record of any attempt to raise the issue suggested by the (withheld) offense reports or of any mention of the individuals concerned by the defense or the state. Furthermore, the state itself has never asserted that it turned over this requested information to the defense. We must therefore remand this issue to the district court for a specific finding as to that

issue, including the taking of additional evidence with regard to it.[7]

Conclusion

[4] In conclusion, we find that if the offense reports requested by the petitioner were withheld from him during his state court trial for murder, this constituted a violation of his due process rights. We remand this proceeding to the district court for a further evidentiary hearing to determine if the requested offense reports were actually withheld. If, after such a hearing, the district court concludes that they were, we further instruct that court to vacate the petitioner's conviction and to issue the writ of habeas corpus, unless within a reasonable period of time to be fixed by the district court the state shall again try the petitioner.

REMANDED WITH INSTRUCTIONS.

---

7. The Magistrate (and the State on appeal) rely on *Landry v. State of Alabama*, 579 F.2d 353 (5th Cir. 1978). This case, however, is inappropriate to the present issue. *Landry* did not concern a specific request to produce the allegedly suppressed *Brady* material; additionally, the claimed *Brady* information in *Landry* that the state did not volunteer would have affected neither the determination of the defendant's guilt nor his punishment.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WESLEY SELLERS, *Petitioner*	§ §	CIVIL ACTION NO.
VS.	§ §	73-H-869
W. J. ESTELLE, JR., Director, Texas Department of Corrections, *Respondent*	§ § § § §	

FINAL JUDGMENT

From a consideration of the pleadings submitted in this case, it is the opinion of this Court that this action should be and is hereby DISMISSED.

The Clerk will enter this Final Judgment and provide all parties with a true copy.

Done at Houston, Texas, this 31st day of August, 1979.

/s/ Woodrow Seals

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WESLEY SELLERS, *Petitioner*	§	CIVIL ACTION NO.
VS.	§	73-H-869
W. J. ESTELLE, JR., Director, Texas Department of Corrections, *Respondent*	§	

ORDER

The Findings and Conclusions of the Magistrate dated February 5, 1979, are adopted and

Petitioner's writ of habeas corpus is DENIED.

The Clerk will enter this Order and provide all parties with a true copy.

Done at Houston, Texas, this 6th day of July, 1979.

/s/ Carl O. Bue, Jr.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WESLEY SELLERS, *Petitioner*	§	CIVIL ACTION NO.
VS.	§	73-H-869
W. J. ESTELLE, JR., Director, Texas Department of Corrections, *Respondent*	§	Judge Carl O. Bue, Jr.

MAGISTRATE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. *Findings of Fact*

1. This is an application for Writ of Habeas Corpus filed by Wesley Sellers, presently in custody of the Texas Department of Corrections, arising out of his conviction of murder on April 14, 1970, by a Harris County jury.

2. Wesley Sellers, hereinafter referred to as "Petitioner", took a direct appeal from that conviction, through his court-appointed attorney, who addressed himself to the issue of the state's suppression of exculpatory evidence on pages 9-10 of his brief filed with the Texas Court of Criminal Appeals. (Petitioner has referred to that issue's argument herein, in his "Petitioner's Reply to Respondent's Motion to Dismiss For Failure To Exhaust State Remedies" filed with the United States District Clerk on or about January 14, 1977.)

3. The Petitioner himself raised the issue of suppression in his pro-se supplemental brief filed with the Texas Court of Criminal Appeals on or about May 10, 1972, in the following language:

"It has been held in *Brady v. Maryland*, 373 U.S. 83 (1963), that where the prosecutor, through error or otherwise, failed to produce upon demand one of several confessions of a co-defendant was error. The Supreme Court . . . stating: Suppression by the prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

It would be presented that the Defense requested in the Discovery Motion, in specific 'Fingerprint Identification Reports and all scientific reports favorable to the accused and material on the issue of guilt or punishment, and any and all *Statements, written, recorded,* or *indicia* of *oral statements,*'. . .

It has been held in *Giles v. Maryland*, 386 U.S. 66 (1967) that when evidence is favorable to the accused is known to the prosecution or the Police, Due Process requires that the evidence be disclosed to the accused without a demand, and failure to reveal requires a reversal of conviction.

The Defendant has a Constitutional right to have the State make available to him all information known to the State which will materially aid the defendant in his defense.

The Defense of Defendant was that he was abducted by three men and placed in a building, for appearances of a burglary. In the process a Police Officer was killed. The State contended Defendant was the only one present at the time of the crime. *The written statements in the possession of the District Attorney* . . . the same which were denied to Defense *possibly would*

> *show that other people were sought by Police in connection with the crime,* as alleged by Defendant, thus supporting the defense of the Defendant. *But, by denial to inspect, the Defendant never received the chance to know what the statements contained.* (emphasis supplied)"

4. The Texas Court of Criminal Appeals is presumed to have considered the suppression issue when it disposed of Petitioner's direct appeal on February 14, 1973, in its opinion reported at 492 SW2d 265, at 266, where the Court stated the following:

> "Appellant's pro se briefs have been reviewed and contentions raised therein which have not been discussed herein are without merit."

5. Thereafter, having been in and out of the State Court System intermittently, Petitioner filed the instant Application for Writ of Habeas Corpus in the United States District Court, on or about June 25, 1973.

6. On or about January 26, 1976, Petitioner filed herein his "Memorandum in Support of Suppression of Evidence Favorable and Material to Petitioner's Defense" which again raised the issue of the State's suppression of exculpatory evidence. Petitioner for the first time since his conviction was able to supply specific names of persons whose statements had allegedly been hidden by the State to fill in his already-presented issue of governmental misconduct. It was in that document that the Petitioner was first able to name Santos Cantera, Amos Santos, Albert Santos, and Alfredo Valenzuela. After filing of a Motion for Production, the Magistrate through the efforts of Walter Prentice, Assistant Attorney General, was able to obtain the police reports involving the named persons.

7. Thereafter, the State came forward on January 5, 1977, and filed its "Motion to Dismiss for Failure to Ex-

haust Available State Remedies", seeking to have Petitioner's application for relief dismissed.

8. On or about January 14, 1977, Petitioner filed his "Reply to Respondent's Motion to Dismiss for Failure to Exhaust Available State Remedies."

9. Petitioner, in an exercise of caution, filed a State Court Application for Writ of Habeas Corpus again tracking his claim of "suppression". It was summarily denied.

10. Thereafter, Petitioner again approached the Texas Court of Criminal Appeals on the claim of "suppression", but relief was summarily denied on or about February 9, 1977.

11. On or about February 25, 1977, Petitioner filed his "Motion for the Court to Recognize as Moot Respondent's Motion to Dismiss for Failure to Exhaust Available State Remedies" with attached exhibits including his pro-se brief to the Court of Criminal Appeals from his original appeal.

12. On September 11, 12, and 14, 1978, the Magistrate conducted an evidentiary hearing in the cause pursuant to Local Rule and 28 U.S.C. § 636(b). At the hearing Petitioner was represented by court-appointed counsel, Mr. Larry Watts, who was assisted by Mr. Calvin Sellers (Petitioner's brother and Mr. Watt's para-legal). Petitioner sought and received permission to give opening and closing statements and participated at various times during the course of the hearing. Petitioner's case was presented ably and vigorously. Respondent was represented by Assistant Attorney General Catherine E. Greene with assistance from Mr. Douglas O'Brien, Assistant District Attorney from Harris County, Texas.

13. At the Magistrate's hearing, Petitioner and counsel withdrew four of Petitioner's original five allegations, with

the understanding that these allegations were to be dismissed with prejudice. The withdrawn allegations concerned:

(A) Denial of the right of compulsory process;

(B) Ineffective assistance of counsel;

(C) Denial of right to file a formal bill of exceptions;

(D) Denial of due process and equal protection under Art. 37.07(3)(a), V.A.C.C.P., which limits the evidence on the issue of punishment to a criminal defendant's prior criminal record, general reputation and character.

The sole ground for relief remaining and presented at the Magistrate's hearing was Petitioner's claim that the State knowingly suppressed evidence relating to guilt at his 1970 conviction for murder in the 182nd Judicial District Court of Harris County, Texas, in Cause No. 144,485.

14. Petitioner was arrested on November 26, 1969, at the Hamilton Junior High School in Houston, Texas. Officers had gone to the school in response to a silent alarm and during their investigation, shots were fired and one of the officers was killed. Petitioner was found wounded and hiding in an upstairs classroom by officers responding to the distress call. He had been shot and was taken by ambulance to Ben Taub Hospital. No other suspects were found in the school.

15. Petitioner was represented at trial by retained counsel Leon Phillips. Prior to trial Petitioner's counsel filed both a Motion for Discovery and Motion to Clarify. Petitioner's pre-trial discovery motion was granted in part and denied in part following a hearing which was designated a

part of Petitioner's record on appeal. Through his pre-trial Motion (ROA at 105) Petitioner sought to obtain:

(1) Statements from Defendant.

(2) Physical evidence removed from Defendant after he became a suspect.

(3) Physical evidence causing Defendant to become a suspect:

(a) bullets
(b) cartridge cases
(c) pistols
(d) clothing
(e) fingerprints
(f) hair
(g) blood stains

(4) All exhonerative physical evidence.

(5) Scientific Reports:

(a) psychiatric reports
(b) psychological reports
(c) firearm identification reports
(d) fingerprint identification reports
(e) ballistics reports
(f) autopsy reports
(g) paraffin test reports
(h) all photographs taken in compilation of the above reports

State Judge Lee Duggan made notations in the margins of the discovery motion corresponding to his individual rulings on each of Petitioner's requests as follows:

(1) "None"

(2) "State agrees to show and tender all physical and

(3) evidence at place and time designated by Court."

(3)(a) "Test *may* be run and may or may not be."

"Thurs. Crime Lab HPD—"

(4) "State knows of none."

(5) (a) "None known"
(b) "None known"
(c) "Court defers ruling"
(d) "Court defers ruling"
(e) "Defendant has"
(f) "Defendant entitled as public record;;
(g) "Court defers ruling"

Testimony at the State-Court pre-trial hearing on Petitioner's discovery motion revealed that his defense counsel had examined all the physical evidence in the possession of the Houston Police Department (ROA at 71-72) and that Petitioner had had opportunity to have his own experts examine the evidence as well. All physical evidence was examined, but written laboratory reports and witness statements were denied. There was no paraffin report. (ROA at 75).

Homicide officers C. E. Smith and Max Langford testified at Petitioner's state trial. Their offense reports were turned over to the defense for use on cross-examination following their direct testimony. Other offense reports were not turned over to the defense attorney.

16. The only witness called by Petitioner or his counsel at the Magistrate's evidentiary hearing was Officer R. D.

Miller of the Houston Police Department Records Division. Officer Miller testified to the procedures utilized by the various departments of the Houston Police Department in the preparation, filing and storage of offense reports, witness statements and the results of laboratory tests. From Officer Miller's testimony, it is apparent that under the Houston Police Department's record keeping system, there was no central file which would contain all information possibly pertinent to the investigation of Officer Moody's killing. Pertinent information might be found in such diverse documents such as: offense reports, supplemental offense reports, written statements from witnesses and suspects, results of laboratory testing, offense reports in companion or related cases, fingerprint comparisons and "rap sheets" briefly outlining prior criminal history. A subpoena was issued to the Chief of the Houston Police Department (or his designated representative) requiring them to produce all records pertaining to the Kenneth Moody slaying regardless of the department in which they were located including records held in unrelated matters on various suspects. These records were ordered turned over to the undersigned United States Magistrate for inspection.

Counsel for both Petitioner and Respondent met with officers of the Houston Police Department and together drafted a list including those materials sought, those the existence of which was in question, and those materials pertaining to the juvenile suspects and witnesses in the Crockett Elementary School burglary. This list was tendered to the Police Department together with the subpoena and the list was returned to the Magistrate with notations alongside each entry concerning the availability of each designated item. Following an *in camera* examination of these records, they were turned over to both counsel for Petitioner and Respondent for their inspection. The Respondent produced at the Magistrate's hearing the following items:

a. Both color and black/white photographs made of the scene of Petitioner's arrest, at the time of the offense, by the Houston Police Department;

b. A voluminous offense report regarding the subject offense as involved Petitioner;

c. A supplemental offense report made in reference to the subject offense which indicated that SANTOS CANTERA was taken before Magistrate Garth Bates when he was advised of his Constitutional rights and then charged with the murder of Kenneth Wayne Moody; further, that same offense report reflects that Santos Cantera "... orally admitted his part in this offense ..." and admitted that he had been in Hamilton Junior High School when Kenneth Wayne Moody was killed.

d. The offense report reflects that Cantera made his admission of guilt to several Houston Police officers after having been implicated by both *oral* and *written* statements made to Houston Police Officers by Alfred Valenzuela, Albert Santos, and Amos Santos.

e. The offense report indicates that Alfredo Valenzuela, Albert Santos, and Amos Santos indicated to Houston Police Officers that Santos Cantera had admitted to each of them that he had killed the officer [Kenneth Wayne Moody] at the school.

The Petitioner was supplied at his State-Court trial only with that portion of the offense report which had been made by officers Smith and Langford. The "supplemental

offense report" reflecting the "admissions" and proceedings involving Santos Cantera was apparently made by Officers Cashmere, McNutt, Brandan, Massey and Bland; it was never produced.

17. Petitioner did not testify before the Magistrate.

18. Respondent called no witnesses and rested after introducing Petitioner's state appeal and state writ files for the limited purposes of supporting his Motion to Dismiss under *Knoxson v. Estelle,* 574 F.2d 1339 (5th Cir. 1978).

19. Evidence claimed by Petitioner to have been suppressed was not exhonerative, and in some cases had actually been handed over to defense counsel:

A. *Witness and Suspect Statements:*

1. Danny Paul Gearing:

The record reflects that defense counsel knew of the cross-examination (sic) police officers concerning the alleged "confession" of Danny Paul Gearing.(ROA at 350-365). No written statement by Mr. Gearing was made. The pertinent offense reports reflect that Paul Gearing voluntarily came to the police station and was questioned, following which a narrative summary of the conversation was made.

2. Santos Cantera:

A review of the offense reports and statements furnished by the Houston Police Department pursuant to the Magistrate's subpoena reflects that Santos Cantera did not make a written statement pertaining to the Kenneth Moody Slaying.

Santos Cantera did give an oral confession to investigating officers and a synopsis of that confession was the subject matter of a supplemental offense report. From the state appeal record and trial transcript before the Magistrate, it is impossible to determine whether this supplemental report was included in those reports given to defense counsel following testimony by Homicide Officers Smith and Langford. From testimony at the Magistrate's evidentiary hearing by Officer Miller, it was learned that the most complete records maintained in any single location would be those maintained by the particular division conducting the investigation (in this case the Homicide Division). Even given that information, the Magistrate cannot speculate upon what documents were among those homicide files turned over to Petitioner's counsel during trial and no offer of proof was made at the evidentiary hearing.

Regardless of whether a summary of Santos Cantera's interrogation was in fact included in the material given defense counsel at trial, such summary is not exhonerative of Petitioner's guilt. In fact, the oral statement is *inculpatory* in that it places Petitioner at the scene voluntarily and completely contradicts Petitioner's elaborate vendetta-kidnapping defense. Moreover, Santos Cantera later recanted any involvement in the burglary and volunteered to submit to a polygraph examination. The only possible benefit to Petitioner in having the Santos Cantera statement would be: if the man were believed, it would show that someone accompanied Petitioner on the burglary attempt.

Contrary to Petitioner's assertions, Santos Cantera never admitted to police that he actually shot Officer Moody. The entire thrust of Cantera's "Confession" was that he went to the junior high school with Petitioner and another man to commit the burglary. Under applicable Texas law, Santos Cantera could have been charged with Officer Moody's killing as a co-defendant, but this would

have had no impact on Petitioner's criminal responsibility.

Even if Santos Cantera's statement to police were viewed, for the sake of argument, as exculpatory, Petitioner has not demonstrated their "materiality" in any constitutional sense. Santos Cantera's statements would have been inadmissible at trial under Art. 38.22, V.A.C.C.P. Texas criminal procedure requires that before an oral confession is admissible, facts or circumstances which conduce to establish his guilt must be found to be true. Here Santos Cantera was unable to locate the black shirt which he told officers he had discarded during his flight. He appeared to be familiar with the layout of the school; however, he was unable to tell officers how entry into the school had been made. Investigating officers concluded Cantera was not involved.

3. Alfredo Valenzuela:

Alfredo Valenzuela was the only one of the four Latin American youths questioned in connection with the Moody slaying to give a *written* statement to investigating officers. Petitioner claims this "confession" is exculpatory in that it implicates Santos Cantera rather than Petitioner as the person who shot Officer Moody.

Clearly this written statement was inadmissible hearsay as it relates to Santos Cantera's alleged confession to the actual shooting.

The statement itself contains basic conflicts such as Santos Cantera's alleged showing of the murder weapon to Valenzuela after the crime and admitting having used it. The murder weapon had in fact been recovered from the scene at the school. Valenzuela's statement cannot be viewed as exhonerative, and at most illustrates confusion. Investigating officers pursued leads found in his written statement, and subsequently dismissed them as the blustering boasts of youth.

4. Amos and Albert Santos:

These two brothers did not give written statements to the Houston Police. Although they were questioned regarding both the Moody killing and various school burglaries, nothing contained in the summary of their interview is exculpatory from Petitioner's standpoint. Their oral statements were inconsistent and unworthy of pursuit.

B. *Physical Evidence:*

Petitioner alleges the District Attorney knowingly suppressed exculpatory evidence concerning fingerprint, blood, and paraffin tests in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The records before this Court reflect that either the requested test results were never performed or that they were not exculpatory:

1. Blood test:

Petitioner asserts that the results of a blood analysis run on the yellow glove he was found wearing were exhonerative in that they state, "positive blood." Because Petitioner's Rh factor is negative, he claims the statement "blood positive" demonstrates it was not his blood found on the glove. Such a reading is a misstatement of the lab report which merely affirms that the crusty substance found on the outside of the glove and the more liquid substance found on the glove were in fact blood. The report states that a test run to determine if the substance were indeed blood came out positive. This is certainly distinguishable from the situation where an analysis of the Rh factor of an individual's blood is found as "positive." In fact, there is no record that the blood found on the glove was typed according to group such as "A", "B", "AB", or "O" or that the blood was further classified according to Rh factor (positive or negative).

2. Fingerprints

Petitioner claims he should have been given a report on latent fingerprints removed from the scene and a report that fingerprints recovered from the scene were matched against his and those of approximately six people he "ran with." It is Petitioner's position that the fact that no match of these prints was made is somehow exculpatory.

Officer Moody was shot in a junior high school where thousands of fingerprints could be expected to be recovered. The fact that Petitioner's prints did not match those recovered from the scene is not exculpatory because Petitioner himself was apprehended at the scene and thus there was no question as to his presence.

Petitioner further complains that there was error when he was not given the results of a latent fingerprint check of his car. Such a latent print examination was referred to in one of the supplemental offense reports although the report itself could not be found. Officer Miller testified that it was not unusual for one officer to state that another officer would file a supplemental offense report when in fact, such a supplemental report was never made. The Magistrate can only surmise that is what happened here. In either event, Petitioner has not established "materiality" in a constitutional sense.

3. Paraffin Test

There is no evidence before this Court that a paraffin test was ever performed.

4. Photographs

By his pre-trial motion Petitioner requested all photographs taken at the scene. Several photographs were in-

troduced at the State Court trial after a proper predicate was laid. There is no showing in the record before the Magistrate whether the photographs not introduced were withheld from defense counsel. Assuming for argument's sake that they were not turned over to defense counsel, Petitioner will (sic) still not demonstrate that those photographs were either exculpatory or material.

The photographs introduced at trial had proper predicates laid before their introduction. Obviously, no such predicate was laid to explain what those photographs turned over to the Magistrate pursuant to subpoena purport to represent. For example, the yellow glove appears to have moved over the distance of two or three floor tiles from one picture to another. However, the glove was in front of a door, and could therefore have been pushed to one side when the door was opened. Similarly, the photographs cannot be *assumed* to represent the location of both gloves at the time investigating officers arrived on the scene *absent* testimony from those officers. It is just as likely one of the gloves was removed from Petitioner to enable arresting officers to place handcuffs on the wounded man without the interference of a bulky leather cuff. The Magistrate will not indulge in speculation in the absence of any explanation of what the photographs were intended to depict at the time they were taken.

Petitioner argues that the apparent discrepancy in the location of the gloves shown by the photography is exhonerative and material because it supports his theory that he was never wearing the gloves. Petitioner overlooks conflicting testimony at trial from various investigating officers concerning the location of each glove. The jury *already* had before it such a discrepancy in testimony from the two officers.

II. *Conclusions of Law*

1. Under the very recent decision of *Knoxson v. Estelle*, 574 F.2d 1139 (5th Cir. 1978), Petitioner filed a post-submission brief attempting to place before the Court of Appeals certain letters to and from his attorney and the trial court relating to his attempts to obtain his trial transcript. The Court of Appeals held that such new factual material must first be presented to the Texas Court and found a failure to exhaust. It pointed out that the interests of the courts, state and federal, and of the Petitioner would best be served by dismissing the suit without prejudice to give Knoxson an opportunity to present his facts to the State Court. That case is legally distinguishable from Wesley Sellers case because here Sellers' newly-discovered facts were always in possession of some agency available to Respondent whether that agency was the Houston Police Department, the Attorney General's Office or the District Attorney's Office.

2. After Mr. Sellers "discovered" the material in the Supplemental Police Report he attempted to argue to the State Court (Judge Duggan) and to the Court of Criminal Appeals that the material was exculpatory and improperly withheld at his trial. Those Courts refused to consider the matter after he filed the instant federal habeas corpus action because of clear Texas law. To give effect to its understanding of the comity basis for the federal exhaustion rule in habeas corpus cases, the Texas Court of Criminal Appeals will not (and directs that trial courts should not) consider a petitioner's application as long as federal courts retain jurisdiction of the same matter. *Ex parte Green*, 548 S.W.2d 914 (Tex. Crim. App. 1977).

3. Petitioner clearly argued to the Texas Court, prior to filing his federal petition, that exculpatory material had been denied to him. At that time he did not know the *exact* content of the material and never saw the reports them-

selves until Assistant Attorney General Prentice and the Magistrate obtained those reports and sent them to him. It would not prejudice state-federal comity for this Court to act on this petition without requiring those exact statements to be submitted first to Texas State Courts. As recently as December 7, 1978, the Court of Appeals for the Fifth Circuit faced a similar exhaustion problem. *Stinson v. State of Alabama*, 585 F.2d 748 (5th Cir. 1978). One Stinson, a State prisoner, sought habeas relief. The District Court dismissed his petition. On appeal, the Fifth Circuit panel remanded to determine whether there was an exhaustion of *all* claims. The Court, *en banc* reheard the case and remanded to the panel to reconsider in light of the October 23, 1978, decision in *Galtieri v. Wainwright*, 582 F.2d 348. On rehearing the Fifth Circuit panel affirmed the District Court's dismissal saying:

> "Here there is doubt whether *any* of petitioner's claims have been exhausted. Nevertheless we conclude, exhaustion being a matter of comity and not jurisdiction, that we should reach the merits of petitioner's remaining claims."

4. Under *Galtieri*, supra, the Fifth Circuit reaffirmed its requirement of exhaustion of *all claims* before petitioning for federal habeas corpus relief. That case, however, involved a district court which granted habeas relief on certain exhausted claims although the petition also raised unexhausted claims. Mr. Sellers case here is not one of mixed claims but rather one where his sole remaining claim has been presented generally to the State Courts but specific facts did not surface *to Petitioner* until three years after he filed his federal petition. Since the facts to support the claim were always within the grasp of Respondent, it would unduly punish Petitioner to require that he now have his federal petition dismissed for a technical failure to exhaust.

5. The record from Petitioner's State Court conviction

is insufficient to demonstrate which records and evidence were turned over to Petitioner and his counsel. It appears that Petitioner's counsel received everything except the investigating officers' work product reports. When these homicide officers testified at trial their complete reports were given to defense counsel for purposes of cross-examination. This case must be controlled by the recent Fifth Circuit decision in *Landry v. State of Alabama*, 579 F.2d 353 (5th Cir. No. 77-2536; Decided September 1, 1978):

> "In addition, the state contends that the report counsel now contends is *Brady* material was given to Landry's trial counsel during the cross-examination of Captain Stallings. Although the record shows that defense counsel was given a police report at that time, we cannot discern from the record before us and the district court whether that is the same report now claimed to have been withheld.
>
> We decline appointed counsel's invitation to engage in appellate fact finding. . . ."

The Magistrate here will not speculate what statements or lab reports were contained in Officer Smith and Officer Langford's reports, even though they were the chief homicide investigating officers in the case. The Magistrate further notes that all physical evidence was available for inspection and expert witness testing by defense counsel.

6. Petitioner produced no testimony concerning which offense reports, statements or lab reports were in the District Attorney's file at the time of trial in 1970, but it is presumed that the District Attorney then had access to all reports discussed herein.

Petitioner produced absolutely no testimony at this evidentiary hearing that the police offense reports, statements, and lab results turned over to the Magistrate pur-

suant to subpoena were not turned over to his defense counsel. Petitioner could have subpoenaed either his trial counsel or the district attorney to testify concerning what documents were in the possession of the district attorney, what documents were handed over to defense counsel, and what spirit of cooperation may or may not have existed between opposing counsel. Alternatively, Petitioner himself could have testified at this evidentiary hearing. Petitioner chose to exercise none of these options. Petitioner has not sustained his burden of proof.

7. The evidence of Petitioner's guilt at his State Court trial was overwhelming. If Petitioner had been furnished the statements, oral and written, now under analysis, his guilt would have remained obvious. The only "reasonable doubt" which could have arisen was whether Petitioner was alone at the school where the officer was shot. The State never made an issue of Petitioner being the sole burglar, and the evidence at the scene was consistent with his not being the sole burglar. He was merely the sole burglar prosecuted. The undelivered statements would not have aided Petitioner's incredible testimony at trial that he was kidnapped by a group of "enemies" and forcibly taken to the school so he could be "framed" with a crime.

8. The Supreme Court in *United States v. Agurs*, 427 U.S. 97 (1976) addressed the duty of the prosecutor to disclose material to a defendant under *Brady v. Maryland*, 373 U.S. 83. The question turned on the difference in the duty owed by the prosecutor when a *Brady* request had been made as opposed to the duty where no such *Brady* request was made. In essence, the Court was discussing exculpatory statements known only to the prosecutors, and the requirement that the prosecutor make disclosures. The rule is:

> ". . . the prosecutor will not have violated his constitutional duty unless his omission is of suffi-

cient significance to result in the denial of the defendant's right to a fair trial." 427 U.S. 97, 108.

and

"And this Court recently noted that there is 'no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.' *Moore v. Illinois,* 408 U.S. 786." 427 U.S. 97, 109.

and

"If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he actually overlooked it." 427 U.S. 97, 110.

The statements under discussion here are certainly not "highly probative" of Sellers' "innocence." They are not even exculpatory in fact.

9. Petitioner Wesley Sellers has failed to carry his burden in this case, that is, to demonstrate facts that establish a constitutional violation. Such is the law in this Circuit. *Clayton v. Blackburn,* 578 F.2d 117 (5th Cir. 1978). Petitioner is not entitled to the relief he seeks.

It is, therefore, RECOMMENDED that Petitioner's writ of habeas corpus be denied.

The Clerk will file this instrument and transmit a copy to each party or counsel. Within ten days after receipt of the copy, a party may file with the Clerk, and serve on all parties, written objections, pursuant to Local Rule 24 and 28 U.S.C. §636(b)(1)(C).

Done at Houston, Texas, this 5th day of February, 1979.

/s/Norman W. Black

United States Magistrate

Opposition

RECEIVED
DEC 28 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 81-1131

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Petitioner,

versus

WESLEY SELLERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL A, MANESS
2000 North Loop West, Suite 123
Houston, Texas 77018
(713) 957-2800

Counsel for Respondent
Wesley Sellers

No. 81-1131

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Petitioner,

versus

WESLEY SELLERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Wesley Sellers respectfully suggests that this case presents none of the extraordinary circumstances justifying the exercise of this Court's discretionary jurisdiction and that, accordingly, the petition for certiorari should be denied.

REASONS FOR DENYING THE WRIT

The basic premise of the petition is that a State criminal defendant tried for capital murder and sentenced to life imprisonment has not been denied a fair trial even though the State has concealed from the accused and his counsel the fact that another individual has previously confessed to and been

charged with the murder in question. As applied to the circumstances of this case, that premise is indefensible.

The case against Respondent as the alleged triggerman in the burglary was entirely circumstantial. The suppressed police department offense reports establish that Santos Cantera had "orally admitted his part" in the murder; that he had been charged with the murder, taken before a magistrate and advised of his rights; that he had made his admission of guilt to several police officers after being implicated in the murder by both oral and written statements made to the police by three friends, Alfredo Valenzuela, Albert Santos and Amos Santos; and that all three of these individuals had told police that Cantera had admitted to each of them that he had killed the officer at the school. Significantly, the suppressed reports also reveal that approximately four months before the murder Cantera was charged with aggravated assault on a police officer who was attempting to question him in connection with a number of burglaries in which he was allegedly involved, and that he had been charged with the burglary of another school less than three months before the murder (PX-1; PX-4).

The State's position is that, under United States v. Agurs, 427 U.S. 97 (1976), the defense request for exculpatory offense reports was insufficiently specific to trigger prosecutorial production (notwithstanding the conceded lack of knowledge on the part of the accused or his counsel of the Cantera confession), and that the defense was obligated to specifically describe those reports in its request. Such a position totally ignores the fact that the purpose underlying the requirement of a specific defense request is to provide the prosecution with fair notice of what is demanded. As pointed out in Scurr v. Niccum, 620 F.2d 186, 190 (8 Cir., 1980), a case very similar to the present one:

> "In applying these principles, it is clear that a request for disclosure of particular information cannot be labeled as either 'specific' or 'general' in a vacuum. Rather, the question must be asked, whether under all the circumstances presented by the case, the request was such as to give the prosecution reasonable notice of what the defense desired. In other words, 'specificity' is a function of several factors, including the literal language of the defense request itself, the apparent exculpatory character of the evidence sought, and the reasonableness of the explanation, if any, for which the evidence was not exposed or was not considered to be material by the prosecution" (emphasis added).

Indeed, as Agurs explicitly recognizes, "there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request." 427 U.S. at 110.

In the present case the exculpatory character of the suppressed offense reports is self-evident. Following remand by the Fifth Circuit, both of the prosecuting attorneys at trial admitted in the subsequent evidentiary hearing that the reports were subject to disclosure and claimed only that they had been unaware of the existence of the reports at the time of trial. Thus, the claimed lack of specificity in the defense request is of little significance. See, e.g., Scurr v. Niccum, supra; Norris v. Slayton, 540 F.2d 1241 (4 Cir., 1976); Austin v. Wyrick, 535 F.2d 443 (8 Cir., 1976).

Moreover, proof in a capital case that the accused was not the triggerman bears directly and substantially upon the punishment to be imposed. Lockett v. Ohio, 438 U.S. 586 (1976). Thus, Cantera's admission that it was he and not Respondent who had actually shot the officer was directly relevant to the jury's assessment of punishment within the range then authorized by Texas law: death, life imprisonment or imprisonment for any term of years not less than 2 years. Given the fact that the jury, after extended deliberation, sentenced Respondent to life imprisonment rather than death, it is clear that "the omitted evidence creates a reasonable doubt that did not otherwise

exist," United States v. Agurs, 427 U.S. at 97, with regard to the appropriate punishment to be imposed.

Finally, irrespective of any other consideration, this is simply a case in which review is sought only for the purpose of correcting an alleged misapplication of Agurs by the Fifth Circuit, at a stage in the proceedings at which no final order granting or denying the writ of habeas corpus has been entered. Such a case is singularly inappropriate for review.

CONCLUSION

For all of the foregoing reasons, Respondent Wesley Sellers respectfully suggests that the petition for certiorari should be denied.

Respectfully submitted,

MICHAEL A. MANESS
2000 North Loop West, Suite 123
Houston, Texas 77018
(713) 957-2800

Counsel for Petitioner Wesley Sellers

RECEIVED
DEC 28 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 81-1131

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Petitioner,

versus

WESLEY SELLERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Wesley Sellers, an inmate of the Texas Department of Corrections, respectfully moves pursuant to 28 U.S.C. section 1915 and Rule 46 of this Court for leave to proceed in forma pauperis and to file the attached typewritten Brief in Opposition.

The affidavit required by Rule 46 is attached to this motion. Respondent was granted leave to proceed in forma pauperis in both the District Court and the Court of Appeals.

Respectfully submitted,

MICHAEL A. MANESS
2000 North Loop West, Suite 123
Houston, Texas 77018
(713) 957-2800

Counsel for Respondent Wesley Sellers

No. 81-1131

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,

Petitioner,

versus

WESLEY SELLERS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Wesley Sellers, being first duly sworn, depose and say that I am the Respondent in the above styled and numbered cause and that I am executing and filing this affidavit in support of my motion for leave to proceed in forma pauperis in said cause.

I further swear that the following statements relating to my financial ability are true and correct.

I am not presently employed, having been confined continuously in connection with this cause since November, 1969. I have not within the preceding twelve months received any income from a business, profession or any other form of self-employment, or in the form of rent payments, interest, dividends or from any other source. I do not own any cash or checking or savings account.

I do not own any real estate, stocks, notes, automobiles or other valuable property. No persons are dependent upon me for support.

I understand that a false statement in this affidavit will subject me to the penalties for perjury.

WESLEY SELLERS

SUBSCRIBED TO AND SWORN BEFORE ME, a notary public, on this 16th day of December, 1981.

NOTARY PUBLIC IN AND FOR HARRIS COUNTY, TEXAS